

COMPLAINT
MOTION FOR LEAVE TO FILE SECOND AMENDED
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

(Copy attached hereto as Exhibit "A").

move the Court for an order granting leave to file Plaintiffs', Second Amended Complaint

through their underprivileged attorneys, Robert J. Siegel and Douglas McKinnely, hereby

Plaintiffs, Omni Innovations, LLC (“Omni”) and Emilly Abbey (“Abbey”) by and

MOTION

Defendants,

**MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT
NOTED FOR HEARING: March 16,
WITHOUT ORAL ARGUMENT
2007**

OMNI INNOVATIONS, LLC, a Washington Limited Liability Company; EMLY ABBEY, an individual, Plaintiff,
ASCENTIVE, LLC, a Delaware limited liability company; ADAM SCHRAN, individually and as part of his marital community; JOHN DOES,
V.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE**

THE HON. THOMAS A. ZILLY

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legal authority cited herein.

This Motion is based upon the files and records herein, and the memorandum of

IV. EVIDENCE RELIED UPON

Second Amended Complaint?

1. Should the Court enter an order granting Plaintiffs leave to file their

III. STATEMENT OF ISSUES

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3.

2. The case involves alleged violations of both the Washington anti-spam statute, 19.190 et seq., and the Federal Can-Spam Act of 2003. ("Scharn").

1. In September 2006, Plaintiffs Omni Innovations, LLC. ("Omni"), a small interactive computer service, and Emily Abbe ("Abbe"), an individual internet and computer user, properly commenced this action against the Defendant Ascenitive, LLC. ("Ascenitive"), a Philadelphia based internet marketing firm, and its principal owner and manager Adam Scharn

1. STATEMENT OF FACTS

Plaintiffs seek only to amend their complaint to clarify certain aspects of their pleadings in response to Defendants' Motion To Dismiss. Specifically, the Second Amended Complaint more accurately and precisely delineates between Plaintiff Omni and Plaintiff Abbe insofar as FRCP 15 and Washington case law provide that leave to amend a complaint should be granted liberally in the interests of justice, "and leave shall be freely given when justice so requires." Federal Rule of Civil Procedure 15(a) provides that a trial court shall grant leave to amend freely "when justice so requires." See *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[T]his mandate is to be heeded."). "[L]eave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (internal citations and quotations omitted).

The purposes of CR 15 are to "facilitate a proper decision on the merits", *CARUSO v. LOCAL 690, INT'L BHD. OF TEAMSTERS*, 100 Wn.2d 343, 670 P.2d 240 (1983), at 349, and to provide each party with adequate notice of the basis of the claims or defenses asserted against him. *PIERCCE CY. SHERIFF v. CIVIL SERV. COMMN*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). SEE GENERALLY 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE 1471 (1971); TRAUTMAN, *PLEADING PRINCIPLES AND PROBLEMS IN WASHINGTON*, 56 WASH. L. REV. 687, 711-14 (1981). Leave to amend should be freely given "except where prejudice to the opposing party would result." *CARUSO*, at 349; SEE ALSO 6 C. WRIGHT & A. MILLER, 1473. The amendment of pleadings is left to the sound discretion of the trial court, whose determination

V. ARGUMENT AND AUTHORITY

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Granting Plaintiffs leave to amend certainly not prejudice Defendants in any way.

As set forth in further detail in Plaintiffs' Response To Motion To Dismiss, at a minimum, the currently operable First Amended Complaint has sufficiently put Defendants on notice, pursuant to FRCP 8(a), of the allegations against them generally, notwithstanding that certain allegations may have been pled with more clarity, as is done in the Second Amended Complaint. No discovery has yet been had, and the parties have only recently filed their joint Status Report.

Plaintiffs submit that allowing them to amend their Complaint is in the interest of justice.

RESPECTFULLY SUBMITTED, this 1st day of March, 2007.

DOUGLAS E. MCKINLEY, JR.
Attorney at Law

/S/ DOUGLAS E. MCKINLEY, JR.

Robert J. Siegel, WSB# 17312
Attorney for Plaintiffs

/S/ Robert J. Siegel, WSB# 20806
Douglas E. McKinley, Jr., WSB# 20806

JUSTICE LAW, P.C.

Robert J. Siegel, WSB# 17312
Attorney for Plaintiffs

Wn.2d 12, 26, 482 P.2d 775 (1971).

or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79

¹⁰⁸ Wn.2d 162, 165, 736 P.2d 249 (1987). Discretion is abused if it is manifestly unreasonable.

will be overruled on review only for an abuse of that discretion. *Heron v. Tribune Pub. Co.*,

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9 1325 FOURTH AVENUE, SUITE 940

8 WASHINGTON BAR NO. 17312

7 ROBERT J. SIEGEL

6 BY: S/ ROBERT J. SIEGEL

5 DATE: MARCH 1, 2007

4 JUSTICE LAW, P.C.

3 I hereby certify that on March 1, 2007, I electronically filed the foregoing with
2 the Clerk of the Court using the CM/ECF system, which will send notification of such
1 filing to the following: Derek A. Newman, Newman & Newman

CERTIFICATE OF SERVICE

1 -5 MOTION FOR LEAVE TO FILE SECOND AMENDED
2 COMPLAINT
3 Seattle, WA 98101
4 Suite 940
5 1325 Fourth Ave.,
6 Phone: 206-304-5400
7 Fax: 206-624-0717
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PROPOSED: 2ND AMENDED COMPLAINT

[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -1
1325 Fourth Ave., Suite 9400
Seattle, WA 98101
Phone: 206-304-5400
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Plaintiff OMNI INNOVATIONS, LLC, (hereinafter “OMNI”) is a Washington limited liability company duly licensed and registered with the State of Washington, with its principal place of business in Franklin County, Washington. Plaintiff EMILY ABBEY, (hereinafter “ABBEY”) is an individual residing in King County, Washington who maintains a computer connected to the internet, which is also located in King County, Washington, on which she sends and receives E-mail, and whose residency information was and is available from and registered with a 2.

PARTIES, JURISDICTION, VENUE

Defendants,

OMNI INNOVATIONS, LLC, a
Washington Limited Liability
company; EMILY ABBEY, an
individual, Plaintiff,
[SECOND] AMENDED
COMPLAINT
NO. 06-01284

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -2
1325 Fourth Ave., Suite 940
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all e-mail addresses at each Domain (the "Recipient Addresses") belonging to all times material hereto, for the Domains and each of them, the information that "Domain").

The domain names served by Plaintiff OMNI include: anthonycentral.com, chiefmusician.net, eahome.com, itdidnotendright.com, jammtonum.com, jaycelia.com, cellajay.com, jaykaysplace.com, rcw190020.com, and gordnonworks.com (collectively the "Domains") and individually and generically a "Domain".

General Allegations

multiple users to a computer server that provides access to the Internet. From and after May 2005, Plaintiff OMNI provided and enabled computer access for Venue is proper pursuant to 28 U.S.C. §1391.

1367.
6. This Court has supplemental jurisdiction of state law claims pursuant to U.S.C. § 1332 (diversity).

5. Jurisdiction is proper pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. in the Western District of Washington.

4. On information and belief, Plaintiffs allege that ADAM SCHRAN, ("Schrän") is an Ascenitive. All acts and practices undertaken by Schrän on behalf of Ascenitive are offices, activities, and practices, including those alleged herein on behalf of Ascenitive, and/or majority shareholder of Ascenitive, and as such controls its principal place of business located in Philadelphia, Pennsylvania.

3. On information and belief, Plaintiffs allege that Defendant ASCENTIVE, LLC, registered with and available through her domain registration. ("ASCENTIVE") is a limited liability company registered in Delaware, with its

2. Washington address, which E-mail address was at all relevant times herein, and is registered with and available through her domain registration.

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[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -3
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16. On the basis of the facts set forth hereinabove, Defendants initiated the transmission of the E-mails, and each of them, to a protected computer in violation of 15 U.S.C. §7704(a), causing damage to Plaintiff Omni as the provider of the Internet access of the E-mails, and each of them, to a protected computer in violation of 15 U.S.C.

15 U.S.C. §7701 et seq.

FIRST CAUSE OF ACTION - CAN-SPAM ACT

15. At all times material hereto, Defendants knew or had reason to know that the others or assisted another or others to transmit the E-mails, and each of them, alternative, Defendant conspired or otherwise acted in collusion with another or Defendant initiated the transmission of the E-mails, and each of them. In the misleading information in registering the domains used to send the subject E-mails, include a valid physical address in the body of the E-mail; and/or used false, or are false in the "From" and "By" tokens in the Received header fields; or fail to limit: IP address and host name information that do not match, or are missing, or materially false or materially misleading. The misrepresentations include without origin or the transmission path thereof, and contains header information that is Each of the E-mails misrepresents or obscures information in identifying the point of computer of Plaintiff Abbey.

12. The E-mails, and each of them, were received by Plaintiff OMNI's servers serving the Domains, or at the Domains themselves, and/or on individual Plaintiff's email "mails" or individually and generically as an "Email".

11. During the time period of approximately August 2003 through February, 2007, each Domain being registered with a Washington address.

10. Washington residents, including Plaintiff Abbey's, was and is available upon request from the registrant of each Domain, each registrant being a Washington resident and

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[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -4
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19. On the basis of the facts set forth hereinabove, Defendants initiated the E-mails, and each of them, in violation of RCW 19.190.030 and Chapter 19.86 RCW, causing damage to Plaintiffs as the recipients of each such E-mail in an amount to be proven at trial, including, but not limited to, treble damages. Defendants' acts as described hereinabove constituted unfair and deceptive acts or practices in the conduct of trade or commerce, which acts or practices caused injury to Plaintiffs, and as such constitute independent violations of RCW 19.86 et seq.

Ch. 19.86 RCW

THIRD CAUSE OF ACTION - CONSUMER PROTECTION ACT

18. On the basis of the facts set forth hereinabove, Defendants initiated, conspired with another to initiate, or assisted the transmission of the E-mails, and each of them, in violation of RCW 19.190.020, causing damage to Plaintiff Omni as the interactive computer service receiving each such E-mail in the amount of \$1,000 for each such E-mail, and to Plaintiff Abby in the amount of \$500 for each such E-mail directed to and received at Abby's E-mail address, as provided in RCW 19.190.040(1) and (2).

RCW 19.190.010 - .070

SECOND CAUSE OF ACTION - CEMA

17. Defendants did willfully and knowingly so act in violation of the provisions of 15 U.S.C. §7701 et seq.

provided in 15 U.S.C. §7706 (g) (3).

service receiving each such E-mail in the amount of \$100 for each such E-mail, as

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[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -5
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4. Such other and further relief as the Court deems just and equitable in the premises.
3. Entry of a permanent injunction against the Defendants prohibiting the Defendants from sending or causing to be sent electronic mail messages of any kind or nature to e-mail addresses at Plaintiffs' Domains and/or email addresses.
2. Entry of a judgment in favor of Plaintiff Abby against the Defendants in the amount of \$1,100 per unlawful E-mail, plus such other and further damages as may be proved at trial, plus treble damages to the extent permitted by Chapter 19.86 RCW and to the extent permitted by 15 U.S.C. §7706 (g) (3) (C), plus pre-judgment and post-judgment interest at the highest rate permitted by law, plus cost of suit and reasonable attorney fees pursuant to Chapter 19.86 RCW and 15 U.S.C. §7706 (g) (4);
1. Entry of a judgment in favor of Plaintiff Omni against the Defendants in the amount of \$1,100 per unlawful E-mail, plus such other and further damages as may be proved at trial, plus treble damages to the extent permitted by Chapter 19.86 RCW and to the extent permitted by 15 U.S.C. §7706 (g) (3) (C), plus pre-judgment and post-judgment interest at the highest rate permitted by law, plus cost of suit and reasonable attorney fees pursuant to Chapter 19.86 RCW and 15 U.S.C. §7706 (g) (4);

Plaintiffs respectfully request the following relief:

REQUEST FOR RELIEF

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RESPECTFULLY SUBMITTED this 27th day of February, 2007.

DOUGLAS E. MCKINLEY, JR.
Attorney at Law
DOUGLAS E. MCKINLEY, JR.
S/ Douglas E. McKinley, Jr.

Robert J. Siegel, WSB#17312
Attorney for Plaintiffs
Robert J. Siegel, WSB#17312
Douglas E. McKinley, Jr., WSB#20806
Attorney for Plaintiffs
Douglas E. McKinley, Jr., WSB#20806

[SECOND] AMENDED COMPLAINT FOR
i.Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

PROPOSED ORDER

AMENDED COMPLAINT [proposed] ORDER GRANTING LEAVE TO FILE SECOND
1325 Fourth Ave., Suite 940 Seattle, WA 98101 Phone: 206-304-5400
AMERICAN JUSTICE LAW, P.C. Fax: 206-624-0717

THIS MATTER having come before the Court by Plaintiffs' Motion For Leave To File Second Amended Complaint, and the Court, having considered all moving and responsive pleadings, and having found that good cause exists, therefore IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion is granted, and Plaintiffs are granted leave to file their Second Amended Complaint;

<p style="text-align: center;">ORDER GRANTING PLAINTIFFS LEAVE TO FILE SECOND AMENDED COMPLAINT NOTED FOR HEARING; WITHOUT ORAL ARGUMENT [March 16, 2007]</p>	
<p style="text-align: right;">Defendants,</p>	
<p style="text-align: center;">V.</p>	
<p style="text-align: center;">Plaintiffs,</p>	
<p style="text-align: center;">OMNI INNOVATIONS, LLC, a Washington Limited Liability Company; EMILY ABBEY, an individual,</p>	
<p style="text-align: center;">ASCENTIVE, LLC, a Delaware limited liability company; ADAM SCHRAN, individually and as part of his marital community; JOHN DOES,</p>	
<p style="text-align: center;">I-X,</p>	

THE HON. THOMAS A. ZILLY

1 JUSTICE LAW, P.C.

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6 AMENDED COMPLAINT

7 [proposed] ORDER GRANTING LEAVE TO FILE SECOND

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DATE: FEB, 27, 2007

1 JUSTICE LAW, P.C.

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CERTIFICATE OF SERVICE

1 Attorney for Plaintiffs

2 Robert J. Siegel, WSB# 17312

3 /S/ Robert J. Siegel

4 JUSTICE LAW, P.C.

5 The Hon. Judge Thomas A. Zilly

6 DONE IN OPEN COURT this ____ of March, 2007.